

COURT OF APPEAL FOR ONTARIO

CITATION: 2222868 Ontario Inc. v. Grimsby (Town), 2020 ONCA 376

DATE: 20200612

DOCKET: C67759

Pepall, van Rensburg and Paciocco JJ.A.

BETWEEN

2222868 Ontario Inc.

Applicant (Respondent)

and

The Corporation of the Town of Grimsby

Respondent (Appellant)

R. Andrew Biggart, for the appellant

Scott Snider and Shelley Kaufman, for the respondent

Heard: April 28, 2020 by video conference

On appeal from the judgment of Justice Meredith Donohue of the Superior Court of Justice, dated November 4, 2019.

Pepall J.A.:

INTRODUCTION

[1] This appeal concerns the interpretation of a municipal by-law, and in particular, the Town of Grimsby Zoning By-law 14-45 (the “By-law”).

[2] The respondent, 2222868 Ontario Inc. (“2222”), purchased a 119-acre property (the “property”) located in the Town of Grimsby on March 30, 2018, after reviewing zoning and permitted uses. The property is adjacent to a private regional airport that is on the same parcel of land as that of 2222.

[3] 2222 proposed to operate a works yard to store construction machinery for a private company. It unsuccessfully applied for site plan approval to permit a “Works Yard”, as that term is defined in the By-law, on part of its property. It maintained that its proposed Works Yard was a permitted use in the Zone designated as the “Utility Zone” in the By-law. The appellant, the Town of Grimsby (the “Town”), took the position that the proposed use did not comply with its By-law, stating: “...the use of the subject lands for a works yard for a private company which does not deliver a public or quasi-public utility is not intended in the terminology contained in either the Zoning By-law or the Official Plan.”

[4] 2222 brought an application for a determination that a private Works Yard is included as a permitted use in the By-law.

[5] The application judge granted the application and subsequently ordered costs of \$40,000 on a partial indemnity scale in favour of 2222. The Town appeals.

[6] For the reasons that follow, I would dismiss the appeal. The application judge correctly concluded that the By-law permits the use proposed by 2222.

FACTS

(1) The By-law

[7] The Town passed the By-law on May 20, 2014. The By-law states that it is in conformity with the Official Plan of the Town that was approved by the Ontario Municipal Board under the *Planning Act*, R.S.O. 1990, c. P.13. The stated purpose of the By-law is to regulate the use of land, buildings and structures, to regulate the construction and alteration of buildings and structures, and to implement the policies of the Town's Official Plan.

[8] The By-law creates numerous Zones, three of which are Employment Zones: the General Employment Zone; the Prestige Employment Zone; and, at issue in this appeal, the Utility Zone. "Utility" is not a defined term in the By-law.

[9] Section 10 of the By-law describes the permitted uses within each Employment Zone. The Utility Zone has four permitted uses: Airport; Utility Corridor; Water and Sewage Treatment, Pumping and Storage Facility; and Works Yard.

[10] Works Yard is defined as "a facility for the storage and repair of machinery, vehicles and equipment."

[11] The By-law provides that where a use is defined, it shall not be interpreted to include any other defined use unless it is stated in the definition to the contrary: s. 2.5.7. Italicized words in the By-law are to provide clarity and to ensure that the By-law and its intent are applied consistently.

[12] Some permitted uses have qualifications. For example, in the Prestige Employment Zone, “Professional and Administrative Office” is a permitted use but “Restaurant” is noted as an “Accessory use” to that Office use. Accessory use is defined in the By-law as “a *use* naturally and normally incidental to, subordinate to or exclusively devoted to a principal *use* and located on the same *lot*”.

[13] No Accessory uses are identified in the Utility Zone. Accordingly, Works Yard is a stand-alone use. A Works Yard Permitted Use is not found elsewhere in the By-law.

(2) The Official Plan

[14] The Town’s Official Plan received final approval on May 12, 2012. Pursuant to s. 24(1) of the *Planning Act*, no by-law shall be passed that does not conform to an Official Plan that is in effect.

[15] Pursuant to s. 24(4) of the *Planning Act*, zoning by-laws are deemed conclusively to conform with an Official Plan where there is no outstanding appeal or appeal periods applicable to the relevant provisions.

[16] In this case, neither party suggested that there is any outstanding appeal or appeal periods relating to the Town's Official Plan.

[17] 2222's property is located in the "Utility Area" designation of the Town's Official Plan. Utility is defined in the Official Plan as "all public and/or private utilities, including but not limited to licensed broadcasting,...a water supply, storm or sanitary sewage...or any other similar works or systems necessary to the public interest."

[18] Section 3.9 of the Official Plan describes the "Intent", "Objectives" and "Permitted Uses" of the Utility Area.

[19] Under the heading "Intent", the Official Plan states that the Utility Area recognizes the existing water treatment plant and pollution control plant and other public and private utilities. The "Objective" is to "ensure that utilities are located in a manner that maximizes their performance while limiting any land use incompatibilities." Lastly, the "Permitted Uses" within the Utility Area designation "shall include [p]ublic and quasi-public *utility* uses of Town-wide or regional significance including existing sewage and water treatment facilities, existing pumping stations, airport use, and transmission towers" (underline emphasis added).

[20] As the application judge observed, the Official Plan uses language of inclusion in the Permitted Uses designation, not prohibition.

[21] The Town states that as a portion of the parcel of land was used for a regional airport, 2222's property was designated as a "Utility Area" in the Official Plan.

(3) The Provincial Policy Statement and the Greenbelt Plan

[22] Pursuant to s. 3 of the *Planning Act*, the Province may issue Policy Statements on municipal planning. The Provincial Policy Statement states that the Official Plan is the most important vehicle for implementation of the Provincial Policy Statement. Decisions of the municipal council shall be consistent with the Policy Statements.

[23] According to the appellant, the Provincial Policy Statement addresses the provincial interest in transportation and infrastructure corridors. An airport is treated as infrastructure, which also includes transit and transportation corridors and facilities. Planning authorities are to plan for and protect corridors and rights-of-way for infrastructure, including transportation, transit and electricity generation facilities, and transmission systems to meet current and future needs. According to the Provincial Policy Statement: "Planning authorities shall not permit *development in planned corridors* that could preclude or negatively affect the use of the corridor for the purpose(s) for which it was identified" and "Planning for land uses in the vicinity of *airports*...shall be undertaken so that:...their long-term operation and economic role is protected..."

[24] The Ontario Government has established a Greenbelt Area for which it has a Greenbelt Plan. Pursuant to s. 7 of the *Greenbelt Act, 2005*, S.O. 2005, c.1, a decision made under the *Planning Act* or in relation to a prescribed matter by a municipal council shall conform with the Greenbelt Plan and no municipality shall pass a by-law that conflicts with the Greenbelt Plan.

[25] The Town states that 2222's lands are located in a "Specialty Crop Area" within the "Protected Countryside" designation under the Greenbelt Plan, and that with certain permitted exceptions such as Infrastructure, a Specialty Crop Area is for agricultural use.

APPLICATION JUDGE'S REASONS

[26] As mentioned, the application judge granted 2222's application and declared that a private works yard is a permitted use for the Utility Zone in the By-law. She rejected the Town's argument that "use" must support or be limited to a utility.

[27] The application judge considered the contents of the Official Plan and went on to note that it speaks of what shall be included in Utility Areas, but does not prohibit non-public or quasi-public uses. Moreover, there was no evidence or argument that the proposed construction equipment storage use is incompatible with the land use objectives. She noted that permitted use does not take its context

from the name of the zone. For example, “Agricultural use” is permitted in the Prestige Employment Zone.

[28] Importantly, the Town failed to link all uses in the Utility Zone to public or quasi-public uses, which it could have done with a qualification or an accessory use designation, as seen elsewhere in the zoning tables included in the By-law. The application judge concluded that the Town’s proposed narrow public uses interpretation was not intended; the By-law was unambiguous and clearly-stated. As such, there was no need to consult the Provincial Policy Statement or the Greenbelt Plan.

[29] The application judge applied this court’s decision in *St. Mary’s Cement Inc. (Canada) v. Clarington (Municipality)*, 2012 ONCA 884, 299 O.A.C. 357, at para. 17:

The modern principles of statutory interpretation apply equally to the interpretation of a municipal by-law and a statute [citation omitted]. Thus, the interpretation of a by-law involves consideration of the text of the by-law, the intent of municipal council, and the purpose and scheme of the by-law as a whole...

[30] The application judge concluded her analysis as follows:

The plain language of the by-law permits the use sought by the applicant. The by-law did not qualify the use to be for a public purpose. The by-law defined “Works Yard” without any restriction to a public use. The zone has already permitted a private airport to operate within the zone. There is no suggestion of the proposed use being incompatible.

GROUNDS OF APPEAL

[31] The Town submits that the application judge erred:

- a) in her interpretation of the By-law by permitting a private Works Yard “that is not in any way related to a Utility use”, notwithstanding:
 - i. that the lands are designated in the Official Plan as “Utility Areas” and are zoned “Utility” in the Town’s By-law consistent with the Official Plan;
 - ii. the context which includes consideration of the Official Plan and the permitted uses in the Utility Zone; and
 - iii. the applicable statutory and policy regime, which includes the Provincial Policy Statement and the Greenbelt Plan; and
- b) in considering compatibility of land use as part of her assessment.

ANALYSIS

[32] It is helpful to first set forth the legal principles applicable to the interpretation of a by-law.

- The interpretation of a by-law is a question of law, reviewable on a correctness standard: *Sarnia (City) v. River City Vineyard Christian Fellowship of Sarnia*, 2015 ONCA 494, 336 O.A.C. 373, at para. 22.
- A zoning by-law is the end-product in law of the planning process legislated by the *Planning Act*: *Rotstein v. Oro-Medonte (Township)*, 2002 CarswellOnt 4411 (S.C.), at para. 22.

- The modern principles of statutory interpretation apply equally to the interpretation of a municipal by-law and statute. Thus, the interpretation of a by-law involves consideration of the text of the by-law, the intent of municipal council, and the purpose and scheme of the by-law as a whole: *Clarington*, at para. 17.
- Official Plans are not statutes: *Bele Himmell Investments Ltd. v. Mississauga (City)*, 1982 CarswellOnt 1946 (Div. Ct.), at para. 22. The purpose of an Official Plan is to set out a framework of “goals, objectives and policies”. It establishes the broad principles that are to govern the municipality’s land use planning generally: *Goldlist Properties Inc. v. Toronto (City)*, 232 D.L.R. (4th) 298 (Ont. C.A.), at para. 49.
- As by-laws are the means by which Official Plans are implemented, the terms of an Official Plan aid in the contextual interpretation of the by-law: *Clarington*, at para. 21.
- Under the *Building Code Act*, 1992, S.O. 1992, c. 23, an applicant for a building permit must be in compliance with the applicable By-law. Unambiguous by-laws provide clarity to the Chief Building Official and to a landowner.

[33] In this case, the application judge identified and applied the correct test. She examined the Zone and the Permitted Uses contained in the By-law. Works

Yard was specifically and unambiguously defined in the By-law. A Works Yard was identified as a separate Permitted Use and not as an Accessory Use. Had the Town intended to link Works Yard to utility use or to public or quasi-public uses, it could have done so by including a Qualification or Accessory use designation in the By-law as it did for other uses. Instead, the Town opted not to do so.

[34] Furthermore, the name of a Zone did not dictate a Permitted Use; this was not the scheme of the By-law. For example, as the application judge observed, Agricultural Use was permitted in the Prestige Employment Zone.

[35] As mentioned, under the *Planning Act*, zoning by-laws are deemed conclusively to conform with an Official Plan in the absence of an appeal or appeal period applicable to the relevant provision. Neither party in this case suggested that there was an outstanding appeal or appeal period. The application judge nonetheless did consider the Official Plan in her interpretation of the By-law. She fairly reasoned that it used language of inclusion rather than prohibition within the Permitted Uses designation of the Utility area. In addition, she noted that the objective of the designation in the Official Plan was to “ensure that Utilities are located in a manner that maximizes their performance while limiting land use incompatibilities.” A Works Yard was compatible with the uses enumerated in the Utility Area designation of the Official Plan.

[36] In these circumstances, I need not comment further on the Provincial Policy Statement or the Greenbelt Plan. I would note, however, that the appellant was unable to direct the court to any authority reflecting a requirement to have recourse to these documents when interpreting a by-law. Furthermore, in oral argument, the appellant acknowledged that while it was open to the application judge to look at these documents, she was not required to do so.

[37] I would also note that, as mentioned, Works Yard is not found as a Permitted Use elsewhere in the By-law. If one were to accept the appellant's proposed interpretation, a Works Yard unconnected to a utility would be prohibited anywhere in the Town, surely an unintended result.

[38] In conclusion, the interpretation of Works Yard in the By-law permitted the use advocated by the respondent.

[39] Lastly, I see no error in the application judge's statement that there was no evidence or argument that the proposed land use of storing construction equipment was in any way incompatible with the land use objectives. This was not the drawing of an adverse inference; it was simply a statement of fact.

DISPOSITION

[40] For these reasons, I would dismiss the appeal with costs of the appeal fixed in the amount of \$21,700 on a partial indemnity scale inclusive of disbursements and applicable tax to be paid by the Town to the respondent.

[41] I see no basis on which to interfere with the application judge's discretionary award of \$40,000 in favour of the respondent for costs of the application.

Released: June 12, 2020

"S.E.P."

"S.E. Pepall J.A."

"I agree. K. van Rensburg J.A."

"I agree. David M. Paciocco J.A."